



0000018260

ORIGINAL

285

## BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman Arizona Corporation Commission  
 MARC SPITZER  
 WILLIAM A. MUNDELL  
 MIKE GLEASON  
 KRISTIN K. MAYES

DOCKETED

MAR 16 2005

AZ CORP COMMISSION  
DOCUMENT CONTROL

2005 MAR 16 A 11:49

RECEIVED

DOCKETED BY

IN THE MATTER OF THE APPLICATION OF **DOCKET NO. W-04291A-04-0843**  
 AERIE CONSERVANCY, AN ARIZONA  
 NONPROFIT CORPORATION, FOR AN  
 ADJUDICATION THAT IT IS NOT A  
 PUBLICSERVICE CORPORATION  
 RESPONSE TO STAFF REPORT

The Aerie Conservancy, an Arizona nonprofit corporation ("Association"), hereby submits its Response to the Staff Report filed in this docket on February 17, 2005. Utilities Division Staff has recommended that the Arizona Corporation Commission ("Commission") approve the Association's Application for Adjudication Not a Public Service Corporation ("Application"), subject to seven conditions (collectively, the "Conditions"), for which compliance documentation must be filed with the Commission no later than December 31, 2006 (the "Compliance Deadline"). The Association has no objection to the requirements spelled out in the first six Conditions. However, the Association requests certain modifications in the Compliance Deadline with regard to Conditions 4 and 6, as hereinafter described, because the Compliance Deadline does not synchronize with the other regulatory requirements that must be satisfied by Red Rock Aerie LLC ("Developer") or with the anticipated construction schedule for

Snell &amp; Wilmer

LAW OFFICES  
 One Arizona Center, 400 E. Van Buren  
 Phoenix, Arizona 85004-2202  
 (602) 382-6000

1 the two-phase Aerie development ("The Aerie"). An explanation of these other regulatory  
2 requirements and the anticipated timeframes associated with The Aerie are set forth below.

3 With regard to Condition 7, the Association requests that this Condition be eliminated  
4 because it would impose a significant hardship upon the Developer by needlessly delaying the  
5 sale of lots within The Aerie for nearly two years without providing any additional protections for  
6 homeowners. Since this issue raises the most serious concern for the Association, it will be  
7 addressed first.  
8

9 **Condition 7--Obtaining a Public Report.**

10 Condition 7 requires that the Association comply with the first six Conditions before a  
11 public report is obtained from the Arizona Department of Real Estate ("ADRE"). Lot sales  
12 cannot be closed until the Developer obtains a public report. However, Condition 7 will cause a  
13 significant delay and financial impact in the marketing of lots within The Aerie. Due to the fact  
14 that The Aerie is surrounded by the Coconino National Forest, there are atypical delays already  
15 built into the development of the property. Access to The Aerie will be via approximately three  
16 miles of road (Boynton Pass Road and Aerie Access Road, hereinafter referred to as the "Access  
17 Roadways") across Forest Service land. The Developer must first obtain legal easements from  
18 the Forest Service to improve the Access Roadways, and must then improve the Access  
19 Roadways to standards set by the Forest Service and approved by Yavapai County. The  
20 Developer cannot commence improvement of the Access Roadways until it obtains approval from  
21 both the Forest Service and Yavapai County. Although such approval is clearly forthcoming, the  
22 Developer does not control the precise timing of the Forest Service approval.  
23  
24  
25  
26

1 The water storage reservoir, which is part of the water system being constructed in the  
2 first phase of development ("Phase I"), cannot be operated until power is brought to the  
3 community. That will occur simultaneously with the construction of the Access Roadways.  
4 Once approval is granted, the improvement of the Access Roadways, the installation of power  
5 and utilities, and the subsequent construction of the on-site infrastructure (including water  
6 infrastructure) for Phase I will take approximately 14 to 16 months from the date that construction  
7 is initiated. Based on the foregoing, if the Developer cannot apply for a public report until all of  
8 the on and off site water infrastructure is completed, lot sales at The Aerie will be delayed for  
9 almost two years. Such a delay would have a material adverse economic impact on the  
10 development, and is inconsistent with ADRE process and industry practice, as explained below.

12 Condition 7 is not necessary to protect the interests of potential lot purchasers because  
13 other safeguards will exist. Upon request by the Developer, and after a showing that the  
14 Developer has complied with all of the agency's regulations, ADRE will issue a public report  
15 when a final plat is recorded.<sup>1</sup> Before any public report issues, ADRE will require that there are  
16 financial assurances in the form of a performance bond to guarantee construction and completion  
17 of the improvements specified in the final plat. The bond amount is based on an engineer's  
18 estimate of the cost of the bonded improvements, and bonding for infrastructure is commonplace  
19 in the industry. The Developer of The Aerie will be required to provide financial assurances as  
20 part of its application to ADRE for a public report, and ADRE will not approve the public report  
21 unless such financial assurances are in place. Thus, the interests of lot purchasers are fully  
22 protected through the performance bond. Beyond that, the Developer of The Aerie has a well-

---

26 <sup>1</sup> See, A.A.C. R4-28-A1211.

1 established and excellent track record of performance in Arizona. To prohibit Developer's ability  
2 to obtain the public report until all of the Conditions are fulfilled would significantly delay the  
3 project with material financial impacts and impose conditions that are not required by the ADRE  
4 or consistent with the ADRE regulations or industry practice. Without the ability to obtain the  
5 public report, The Aerie project may not proceed.  
6

7 It is also important to point out that the Developer is selling lots, not homes. From the  
8 time a lot in The Aerie is purchased, the Developer estimates that it will take more than two years  
9 for a home to be constructed, assuming the lot owner proceeds immediately with design and  
10 construction after purchasing a lot. Architectural plans must be prepared and approved, a  
11 contractor selected, and construction permitted and completed. The Aerie is a high end  
12 community that will require the lot buyers to comply with a comprehensive set of design  
13 guidelines. Comparable communities in the Sedona area have seen slow absorption and the  
14 passage of many years before homes are actually constructed. By the time a home is constructed,  
15 the water infrastructure will be complete and a final certificate of occupancy will not be issued  
16 until the County deems the infrastructure complete. Thus, there is ample time following the  
17 issuance of a public report to complete the necessary water infrastructure before any homes are  
18 completed.  
19

20 To prohibit the developer from obtaining a public report until Conditions 1-6 are satisfied  
21 would needlessly delay development of The Aerie and impose conditions that are not required by  
22 ADRE. Further, the performance bond required by ADRE will adequately protect the interests of  
23 lot purchasers, and will ensure the timely completion of water infrastructure within the  
24 development.  
25  
26

1 Finally, it should be noted that the Association is not responsible for obtaining the public  
2 report, and thus, Condition 7 should not be applied to the Association. For the reasons set forth  
3 above, the Association requests that Condition 7 be eliminated.

4 **Conditions 4 and 6--Modification of Compliance Deadline.**

5  
6 In order to understand the practical impediments created by the proposed Compliance  
7 Deadline, an overview of the developmental timeline is important. The Aerie is a planned  
8 custom-lot community located in an unincorporated area within Yavapai County, Arizona. The  
9 Aerie is unique from almost all other developments in that it is entirely surrounded by the  
10 Coconino National Forest. The Aerie will be developed in two distinct phases, and will be  
11 comprised of residential lots, common areas and a potable water system to serve the residences.  
12 Phase I, located on approximately 100 acres, will consist of approximately 41 single-family  
13 custom lots, and Phase II, located on approximately 77 acres, will consist of approximately 33  
14 single-family custom lots. Phase I and Phase II are not contiguous and are separated by National  
15 Forest land. All of the lots will be a minimum of two acres. Construction of Phase II will not  
16 commence until Phase I construction is complete and there are sufficient sales of the Phase I lots  
17 to justify further construction. The Aerie is limited to a total of 78 residential lots, and there are  
18 no adjacent private lands to be developed.  
19

20  
21 As part of the construction of Phase I, more than three miles of unimproved Forest Service  
22 roads (Boynton Pass Road and Aerie Access Road) will be improved to provide access to The  
23 Aerie and power and utilities will be installed concurrently. As part of the construction of Phase  
24 II, a steep and unimproved Forest Service road that currently connects the Phase I property and  
25  
26

1 the Phase II property (the "Connecting Road") will be constructed to provide access to the Phase  
2 II lots.

3 To date, the sale of lots in The Aerie has not commenced. The Phase I lots will be sold  
4 first. Recordation of the final plat for Phase I is the initial step that must be completed before  
5 sales and construction begin. The Developer cannot obtain a public report from ADRE for Phase  
6 I until the final plat for Phase I is recorded.  
7

8 As part of the requirements for recording the final plat for Phase I, the Developer is  
9 required to obtain the above-described easements from the Forest Service for the Access  
10 Roadways.<sup>2</sup> The Developer has been diligently working with the Forest Service to finalize the  
11 details regarding the easements. Although the Developer is working on the final plat submittal  
12 for both Phase I and Phase II, and is expected to submit each for approval within the next three to  
13 five months, the recordation of the Phase I plat is contingent upon the finalization of the above-  
14 described easements with the Forest Service, a matter which is largely beyond the control of the  
15 developer. Notwithstanding, the Developer anticipates that construction activities within Phase I  
16 will commence by the end of 2005.  
17

18 It is not known when construction within Phase II will commence. Because of the high-  
19 end price range for lots in The Aerie, a slow absorption rate is anticipated; the expectation is the  
20 sale of 10-12 lots per year or 4 to 5 years to sell out Phase I. For this reason, the Developer  
21 estimates the timing of construction of Phase II to begin in approximately 2009 with completion  
22

---

23 <sup>2</sup> Forest Service lands will be impacted by the improvements to Boynton Pass Road, Aerie Access Road and the  
24 Connecting Road. As a result, a previous developer of the property (Precambrian Development) facilitated the  
25 preparation of an Environmental Assessment ("EA") in 1999 to evaluate the environmental impacts associated with  
26 improving the roads to provide access to the property. The EA identified multiple alternatives to access the Aerie  
development. In February 2000, the Forest Service issued a Decision Notice selecting Alternative 1 as the preferred

1 to occur within 12 to 14 months after construction commences. It is for this reason that the  
2 Developer requested, and was granted an extension of up to five years to record the final plat for  
3 Phase II by the Yavapai County Board of Supervisors.<sup>3</sup>

4 The major source and storage infrastructure for the water system, which includes the well  
5 improvements, booster pump station and 120,000 gallon water storage reservoir, will be located  
6 in and constructed as a part of the Phase I infrastructure. This backbone water infrastructure will  
7 serve both Phase I and Phase II without any additional expansions or upgrades needed to the  
8 source and storage infrastructure in order to serve Phase II. In addition, the plans for the storage  
9 reservoir have changed since the filing of the Association's Application. Instead of the originally  
10 planned 60,000 gallon storage reservoir, a 120,000 gallon storage reservoir will be constructed.  
11 The 120,000 gallon water storage reservoir is twice the size that was required by the Sedona Fire  
12 Department.<sup>4</sup> The water distribution system for each phase of the development will be  
13 constructed when the on-site roads for that phase is built.  
14  
15

16 The Association can and will comply with the December 31, 2006, Compliance Deadline  
17 for Conditions 1, 2, 3, and 5, as recommended by Staff. However, due to the unique location of  
18 the development within the Coconino National Forest, the additional requirements imposed by the  
19 Forest Service in order to gain legal access to the development, and the plan to complete the  
20 Aerie development in two phases, the time to complete the planning, platting and infrastructure  
21 construction for both phases will be approximately seven years, which is outside the Compliance  
22 Deadline set forth in the Staff Report. For this reason, the Association requests that the  
23

24 access to the Aerie development. Alternative 1 requires extensive improvements and additions to the area's roads  
25 and trailheads.

26 <sup>3</sup> See Exhibit I to the Association's Application in this docket.

1 Compliance Deadline for Conditions 4 and 6 be modified. Specifically, the Association requests  
2 the modification of the Compliance Deadline for filing a copy of the ADEQ Approval of  
3 Construction (Condition 4) and the date for filing the final recorded plat for Phase II (Condition  
4 6), as hereinafter described.

5  
6 The Compliance Deadline for filing final recorded plats for the Aerie development should  
7 recognize that the phases will proceed sequentially. Because the initial step to the construction  
8 process is contingent upon obtaining easements from the Forest Service, the actual timeline is not  
9 within the Developer's or the Association's control. In addition, the timing for construction of  
10 Phase II is contingent upon the sales and absorption rate in Phase I, and as such, the Association  
11 cannot predict exactly when construction of Phase II will begin. Therefore, the Association  
12 requests that the Compliance Deadline for filing the final recorded plat for Phase II mirror the  
13 requirement of the Yavapai County Board of Supervisors. The Association requests that  
14 Condition 6 be modified as follows:  
15

- 16 • That the Aerie Conservancy file with Docket Control a copy of the final  
17 recorded plat for Phase I of the development by December 31, 2006, and a  
18 final recorded plat for Phase II of the development by December 31, 2009.

19 There is also a timing issue related to Condition 4, which requires that an Approval of  
20 Construction be filed with the Commission by December 31, 2006. To obtain ADEQ's Approval  
21 of Construction upon completion of construction of the water system (including the well  
22 improvements, booster pump station, water storage reservoir and water distribution system), a  
23 professional engineer must perform a final inspection and submit a Certificate of Completion to  
24

25  
26 <sup>4</sup> The Association's Application stated that a 60,000 gallon storage reservoir would be constructed. With this filing,  
the Association hereby updates the record.



1 ADEQ certifying that the construction conforms to the approved plans and specifications.<sup>5</sup> It is  
2 anticipated that the Phase I construction (including the well improvements, booster pump station,  
3 water storage reservoir and water distribution system), will be completed and that the required  
4 documentation could be submitted to ADEQ by December 2007. However, it is the Developer's  
5 understanding that ADEQ may wait to issue the Approval of Construction for Phase I water  
6 improvements until the completion of Phase II water distribution system, which is expected in the  
7 2009-2010 timeframe. As a result, the Association does not believe that it is possible to comply  
8 with the proposed Compliance Deadline for Condition 4.

10 To address this issue, the Association requests that in lieu of the submission of an  
11 Approval of Construction for Phase I, the Association be required to file the documentation  
12 required by ADEQ (*i.e.*, the final inspection and Certificate of Completion by a professional  
13 engineer) with Docket Control within twelve months of commencement of construction of the  
14 water system facilities in Phase I. This would meet the intent of Condition 4 by providing the  
15 Commission with evidence that the Phase I water system was constructed in compliance with the  
16 ADEQ Approval to Construct in a more timely manner than the ADEQ regulatory scheme  
17 affords. The Association requests that Condition 4 be modified as follows:

- 19 • That within twelve months after the commencement of  
20 construction of the water system in Phase I, the Aerie  
21 Conservancy file with Docket Control a Certificate of Completion  
22 sealed by a professional engineer registered in the State of  
23 Arizona certifying that construction of the water system for Phase  
24 I conforms to the Approval to Construct issued by ADEQ.
- 25 • That within twelve months after the commencement of  
26 construction of the water system in Phase II, the Aerie  
Conservancy file with Docket Control a copy of the Approval of  
Construction from the ADEQ for Phases I and II of the  
development.

---

<sup>5</sup> See A.A.C. R18-5-507(B).

1           These proposed modifications to the Compliance Deadlines for Conditions 4 and 6 will  
2 provide the Commission with the information it seeks, but will accommodate the anticipated  
3 construction schedule for the development and ADEQ's regulatory framework.  
4

5       **Updated and Clarifying Information.**

6           The Association provides the following information in order to update, clarify and correct  
7 the record in this docket.

- 8           • The Staff Report states that The Aerie is a planned development of Communities  
9 Southwest Holdings, LLC. However, Communities Southwest Holdings, LLC,  
10 establishes separate legal entities for each of its various development projects. For  
11 The Aerie, the ownership entity is Red Rock Aerie, LLC. The members of Red Rock  
12 Aerie, LLC, are Demajeka, LLC, Athansor, Inc., and Knight Industries, LP. The  
13 manager of Red Rock Aerie, LLC, is Communities Southwest Management, Inc.  
14
- 15           • Red Rock Aerie, LLC, has now closed on The Aerie property. The ownership  
16 structure is through a Dual Beneficiary Subdivision Trust. The first beneficiaries are  
17 of the trust are: (i) Sedona Tree Farm Limited Liability Limited Partnership, (ii)  
18 Sedona Red Rock Land Limited Liability Limited Partnership, and (iii) Pegasus  
19 Numero Dos, L.L.C. The second beneficiary is Red Rock Aerie, LLC. The trustee is  
20 First American Title Insurance Company.  
21
- 22           • The Aerie Conservancy, an Arizona nonprofit corporation, was formed in November  
23 2004.  
24
- 25           • The Aerie Conservancy will construct a 120,000 gallon storage reservoir, as opposed  
26 to the 60,000 storage reservoir stated in the application.

**Conclusion.**

The Aerie Conservancy supports the Staff recommendation to approve the Association's application for adjudication not a public service corporation. With the modifications to the Compliance Deadline requested herein, the Association can satisfy Conditions 1 through 6 in the Staff Report. With regard to Condition 7, the Association requests that the condition be eliminated.

RESPECTFULLY submitted this 16th day of March, 2005.

SNELL & WILMER



Jeffrey W. Crockett  
Deborah R. Scott  
One Arizona Center  
Phoenix, Arizona 85004-2202  
Attorneys for The Aerie Conservancy

Original and 13 copies filed this  
16th day of March, 2005, with:

Docket Control  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85004

A COPY of the foregoing was hand-delivered  
this 16th day of March, 2005, to:

Teena Wolf, Administrative Law Judge  
Hearing Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

David Ronald, Staff Attorney  
Legal Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007